**RICHARD LLOYD V. GOOGLE LLC**

 United Kingdom, Europe

**CLOSED**

**EXPANDS EXPRESSION**

**MODE OF EXPRESSION**

Electronic/Internet-based Communication

**DATE OF DECISION**

October 2, 2019

**OUTCOME**

Appeal Allowed, Application Granted; Right to recover damages for loss of control of Data under the Data Protection Act without proving pecuniary loss or distress established and upheld.

**CASE NUMBER**

[2019] EWCA Civ 1599

**JUDICIAL BODY**

Appellate Court

**TYPE OF LAW**

Civil Law

**THEMES**

Privacy, Data Protection and Retention

**TAGS**

Right to Privacy, Data Protection and Retention, Personal Data, Browser Generated Information, Data Processing.

**CASE ANALYSIS**

**Case Summary and Outcome**

Mr Lloyd, a champion of consumer protection, brought this action seeking damages against Google LLC, a Delaware corporation (“Google”). Mr Lloyd makes the claim on behalf of a class of more than 4 million Apple IPhone users. It is alleged that Google secretly tracked some of their internet activity, for commercial purposes, between 9th August 2011 and 15th February 2012.Mr Lloyd applied to the trial court to serve proceedings on Google outside the jurisdiction but Mr Justice Warby dismissed the application. Dissatisfied with the dismissal, Mr Lloyd appeal the ruling. The Appellate court in particular made an order granting Mr. Lloyd permission to serve the proceedings on Google outside the jurisdiction of the court. The Royal Courts of Justice (Appellate court) held that a claimant can recover damages for loss of control of their data under section 13 of Data Protection Act 1998 (DPA), without proving pecuniary loss or distress, and that the members of the class that Mr Richard Lloyd (“Mr Lloyd”) seeks to represent did have the same interest under CPR Part 19.6(1) and were identifiable. The Appellate court equally held that the judge (i.e. the lower court) exercised his discretion that the action should proceed as a representative action on the wrong basis and that the appellate court could and indeed did exercise its discretion afresh.

**Facts**

On 31st May 2017, Mr Lloyd issued a claim form alleging Google LLC of breach of statutory duty under Section 4(4) of the Data Protection Act. It sought, on behalf of the represented class, damages under section 13 of the DPA for infringement of their data protection rights, commission of the wrong, and loss of control over their data protection rights. It was alleged that Google, as a data controller, failed to comply with the first, second and seventh data protection principles set out in Part I of Schedule 1 to the DPA. In broad terms, the first principle requires that personal data shall be processed fairly and lawfully, the second principle requires that personal data shall be obtained only for one or more specified and lawful purposes, and the seventh principle requires that appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data.

The trial Court in this case adopted the technical background to Mr. Lloyd’s claim as set out by the lower court as follows:-

“7. The case concerns the acquisition and use of browser generated information or “BGI”. This is information about an individual’s internet use which is automatically submitted to websites and servers by a browser, upon connecting to the internet. BGI will include the IP address of the computer or other device which is connecting to the internet, and the address or URL of the website which the browser is displaying to the user. As is well-known, “cookies” can be placed on a user’s device, enabling the placer of the cookie to identify and track internet activity undertaken by means of that device.

8. Cookies can be placed by the website or domain which the user is visiting, or they may be placed by a domain other than that of the main website the user is visiting (“Third Party Cookies”). Third Party Cookies can be placed on a device if the main website visited by the user includes content from the third party domain. Third Party Cookies are often used to gather information about internet use, and in particular sites visited over time, to enable the delivery to the user of advertisements tailored to the interests apparently demonstrated by a user’s browsing history (“Interest Based Adverts”).

9. Google had a cookie known as the “DoubleClick Ad cookie” which could operate as a Third Party Cookie. It would be placed on a device if the user visited a website that included content from Google’s Doubleclick domain. The purpose of the DoubleClick Ad cookie was to enable the delivery and display of Interest Based Adverts.

10. Safari is a browser developed by Apple. At the relevant time, unlike most other internet browsers, all relevant versions of Safari were set by default to block Third Party Cookies. However, a blanket application of these default settings would prevent the use of certain popular web functions, so Apple devised some exceptions to the default settings. These exceptions were in place until March 2012, when the system was changed. But in the meantime, the exceptions enabled Google to devise and implement the Safari Workaround. Stripped of technicalities, its effect was to enable Google to set the DoubleClick Ad cookie on a device, without the user’s knowledge or consent, immediately, whenever the user visited a website that contained DoubleClick Ad content.

11. This enabled Google to identify visits by the device to any website displaying an advertisement from its vast advertising network, and to collect considerable amounts of information. It could tell the date and time of any visit to a given website, how long the user spent there, which pages were visited for how long, and what ads were viewed for how long. In some cases, by means of the IP address of the browser, the user’s approximate geographical location could be identified. Over time, Google could and did collect information as to the order in which and the frequency with which websites were visited. It is said by the claimant that this tracking and collating of BGI enabled Google to obtain or deduce information relating not only to users’ internet surfing habits and location, but also about such diverse factors as their interests and habits, race or ethnicity, social class, political or religious views or affiliations, age, health, gender, sexuality, and financial position.

12. Further, it is said that Google aggregated BGI from browsers displaying sufficiently similar patterns, creating groups with labels such as “football lovers”, or “current affairs enthusiasts”. Google’s DoubleClick service then offered these groups to subscribing advertisers, allowing them to choose … the type of people that they wanted to direct their advertisements to”.

On 29th November 2017, Mr Lloyd applied to the trial court for permission to serve the proceedings outside the jurisdiction on Google in the USA. Warby J (the trial judge) however, dismissed Mr Lloyd’s application after a contested hearing between 21st and 23rd May 2018 on the basis that: (a) none of the represented class had suffered “damage” under section 13 of the DPA, (b) the members of the class did not in anyway have the “same interest” within CPR Part 19.6(1) so as to justify allowing the claim to proceed as a representative action, and (c) the judge of his own initiative exercised his discretion under CPR Part 19.6(2) against allowing the claim to proceed.

This appeal therefore was filed by Mr. Lloyd following his dissatisfaction with the dismissal of his application by the trial court.

**DECISION OVERVIEW**

 Sir Geoffrey Vos, led the three man panel that sat on appeal in the matter and delivered judgment. The panel comprised the trio of Dame Victoria Sharp, President of the Queen’s Bench Division; Sir Geoffrey Vos, Chancellor of the High Court; and Lord Justice Davis. The main issues submitted to the Appellate court for determination are: (a) whether the judge was right to hold that a claimant cannot recover uniform *per capita* damages for infringement of their data protection rights under section 13 of the DPA, without proving pecuniary loss or distress, (b) whether the judge was right to hold that the members of the class did not have the same interest under CPR Part 19.6(1) and were not identifiable, and (c) whether the judge’s exercise of discretion can be vitiated.

Submitting on the issues, Mr Hugh Tomlinson QC, leading counsel for Mr Lloyd, argued that if damages are available without proof of pecuniary loss or distress for the tort of misuse of private information (“MPI”), they should also be available for a non-trivial infringement of the DPA relying on the decisions of Mann J and the Court of Appeal in ***Gulati v. MGN Limited* [2015] EWHC 1482 (Ch) (Mann J), [2015] EWCA Civ 1291 (CA) (“*Gulati*”).** He submitted that both claims are derived from the same fundamental right to data protection contained in article 8 of the Charter of Fundamental Rights of the European Union 2012 (the “Charter”) and that “[e]veryone has the right to the protection of personal data concerning him or her”. He contended that that right is reinforced by article 47 requiring that “[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal …”. Mr. Tomlinson further contended that those in the represented class were entitled to “user damages” or what the Supreme Court has now called “negotiating damages” citing ***One Step (Support) Ltd v. Morris-Garner* [2018] UKSC 20, [2018] 2 WLR 1353 (“*One Step*”)** in support of his submission**.**

Mr. Tomlinson conceded that this action, if allowed to proceed, would be an unusual and innovative use of the representative procedure in CPR Part 19.6 but submitted that the authorities did not always prevent representative actions for damages. Here, there was no relevant factual distinction between the pleaded claims of any of the represented class, nor could Google raise any individual defence. The judge, Mr. Tomlinson argued, exercised his undoubted discretion under CPR Part 19.6(2) on the wrong basis.

Conversely, Mr Antony White QC, leading counsel for Google, submitted that both article 23.1 of the Data Protection Directive (the “Directive”) and section 13(1) of the DPA require proof of causation and consequential damage. He argued that the Directive requires Member States to provide that “any person who has suffered damage as a result of an unlawful processing operation” or any contravention of the DPA is entitled to receive compensation, and the DPA provides that “an individual who suffers damage by reason of any contravention” is entitled to compensation for that damage. Mr White contended that *Gulati* did not approve an award of damages for the abstract fact that a person has had their personal information misused. Rather, it held only that damages for misuse of private information could be awarded in the absence of material loss or distress where the defendant’s breach of privacy had a significant adverse effect on the claimant’s right to choose when and to whom their information was disclosed. Mr. White submitted that user damages should not be made available simply because that might be a just course to adopt.

Mr White further argued that the authorities clearly prevented a representative claim for damages save in exceptional circumstances that did not exist here. Allowing such a claim would be an inadmissible use of the procedure; only Parliament could introduce a new regime to allow such a claim. He submitted that the judge had been right to hold that the definition of the represented class had to be conceptually sound and workable. Actions could not be pursued on behalf of persons who were not identifiable before judgment and perhaps not even identifiable then. Mr. White therefore concluded that the judge’s discretion had been exercised on an appropriate basis and could not be interfered with.

In deciding this matter, the appellate court considered the provisions of the following legislation; Data Protection Directive (which was later replaced by General Data Protection Regulation), Charter of the Fundamental Human Rights of the European Union and the Data Protection Act. The recitals to the Data Protection Directive which was aimed at safeguarding privacy rights in the context of data-management includes:

*“(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals; ...*

*(7) Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State;*

*(8) Whereas, in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; …*

*(10) Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [the “Convention”] and in the general principles of [EU] law; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the [EU];*

*(11) Whereas the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. …*

*(55) Whereas, if the controller fails to respect the rights of data subjects, national legislation must provide for a judicial remedy; whereas any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, …”.*

Article 1 of the Directive provided as follows:

*“Object of the Directive*

*In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data”.*

 *Article 22 of the Directive (“article 22”) provided as follows:*

*“Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 28, prior to referral to the judicial authority, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national law applicable to the processing in question”.*

*Article 23 of the Directive (“article 23”) provided as follows:*

*“1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered”.*

The Data Protection Act (DPA)

19. Section 1(1) of the DPA provides as follows:

*“personal data” means data which relate to a living individual who can be identified—*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller…”.*

20. Section 3 of the DPA provides as follows:

*“In this Act “the special purposes” means any one or more of the following—*

*(a) the purposes of journalism,*

*(b) artistic purposes, and*

*(c) literary purposes”.*

21. Section 4 of the DPA provides as follows:

*“(1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1. …*

*(4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller”.*

Section 13 of the DPA (“section 13”) provides as follows:

*“(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.*

*(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—*

*(a) the individual also suffers damage by reason of the contravention, or*

*(b) the contravention relates to the processing of personal data for the special purposes”*

Section 14(4) of the DPA provides as follows:

*“If a court is satisfied on the application of a data subject—*

*(a) that he has suffered damage by reason of any contravention by a data controller of any of the requirements of this Act in respect of any personal data, in circumstances entitling him to compensation under section 13, and*

*(b) that there is a substantial risk of further contravention in respect of those data in such circumstances,*

*the court may order the rectification, blocking, erasure or destruction of any of those data”.*

The CPR

24. CPR Part 19.6 provides as follows:-

*“(1) Where more than one person has the same interest in a claim –*

*(a) the claim may be begun; or*

*(b) the court may order that the claim be continued,*

*by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.*

*(2) The court may direct that a person may not act as a representative.*

*(3) Any party may apply to the court for an order under paragraph (2).*

*(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule –*

*(a) is binding on all persons represented in the claim; but*

*(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court”.*

The Appellate court in final analysis preferred the arguments advanced on behalf of Mr. Lloyd and accordingly resolved all three issues raised for its determination in favour of Mr. Lloyd. In resolving the first issue, the court agreed with Mr. Tomlinson that the decision in *Gulati* is:

“(a) relevant, albeit strictly not binding on us as it was not a decision on the DPA, and

(b) applicable by analogy, for three main reasons. First, both MPI and section 13 derive from the same core rights to privacy. Secondly, since loss of control over telephone data was held to be damage for which compensation could be awarded in *Gulati*, it would be wrong in principle if the represented claimants’ loss of control over BGI data could not, likewise, for the purposes of the DPA, also be compensated. Thirdly, the EU law principles of equivalence and effectiveness point to the same approach being adopted to the legal definition of damage in the two torts which both derive from a common European right to privacy.”

The Appellate court also cited and relied on other authorities in support of its view above including the cases of ***Halliday v. Creation Consumer Finance Limited* [2013] EWCA Civ 333; *AAA v. Associated Newspapers Ltd* [2012] EWHC 2103 (QB), [2013] EMLR 2 (Nicola Davies J) (“*AAA*”) and *Weller v. Associated Newspapers Ltd* [2014] EMLR 24 (“*Weller*”)** all of which support the proposition that privacy breaches leading to loss of control over data ought to be compensated without proof of distress or pecuniary loss. The court concluded as follows:

“For the reasons, I have given, I would conclude that damages are in principle capable of being awarded for loss of control of data under article 23 and section 13, even if there is no pecuniary loss and no distress. The words in section 13 “[an] individual who suffers damage by reason of [a breach] is entitled to compensation” justify such an interpretation, when read in the context of the Directive and of article 8 of the Convention and article 8 of the Charter, and having regard to the decision in *Gulati*. Only by construing the legislation in this way can individuals be provided with an effective remedy for the infringement of such rights.”

On the second issue to wit: Was the judge right to hold that the members of the class did not have the same interest under CPR Part 19.6(1) and were not identifiable? The Appellate court held that the persons represented in a claim brought under CPR Part 19.6 must have the “same interest” in the claim citing **T*he Duke of Bedford v. Ellis* [1901] A.C. 1 and *Markt & Co v. Knight Steamship Company* [1910] 2 K.B. 1021** in support**.** The court however expressed the view that the trial judge in the instant appeal applied too stringent a test of “same interest”, partly because of his determination as to the meaning of “damage”. The Appellate court then proceeded to express a contrary view as follows:

“Once it is understood that the claimants that Mr Lloyd seeks to represent will all have had their BGI – something of value - taken by Google without their consent in the same circumstances during the same period, and are not seeking to rely on any personal circumstances affecting any individual claimant (whether distress or volume of data abstracted), the matter looks more straightforward. The represented class are all victims of the same alleged wrong, and have all sustained the same loss, namely loss of control over their BGI. Mr Tomlinson disavowed, as I have said, reliance on any facts affecting any individual represented claimant. That concession has the effect, of course, of reducing the damages that can be claimed to what may be described as the lowest common denominator. But it does not, I think, as the judge held, mean that the represented claimants do not have the same interest in the claim. Finally, in this connection, once the claim is understood in the way I have described, it is impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others. The wrong is the same, and the loss claimed is the same. The represented parties do, therefore, in the relevant sense have the same interest. Put in the more old-fashioned language of Lord Macnaghten in ***The Duke of Bedford***at [8], the represented claimants have a “common interest and a common grievance” and “the relief sought [is] in its nature beneficial to all”.

The court continued thus:

“If individual circumstances are disavowed, the representative claimant could, be entitled to claim a uniform sum in respect of the loss of control of data sustained by each member of the represented class. The sum will be much less than it might be if individual circumstances were taken into account, but it will not be nothing for the reasons I have given in answering the first issue. It will take into account, at least, the facts of the tort proved against Google generically, and the effect, in terms of loss of control of personal data, that the breaches would have on any person affected by Google’s unlawful actions.”

On the question whether the represented class was identifiable, the Appellate court answered in the affirmative stating that the only applicable test is that “it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having” the same interest as Mr Lloyd “[a]t all stages of the proceedings, and not just at the date of judgment”.

The court held further:

“I cannot see why that test is not satisfied here. Every affected person will, in theory, know whether he satisfies the conditions that Mr Lloyd has specified. Also, the data in possession of Google will be able to identify who is, and who is not, in the class. Both exercises can be undertaken at any time. It is true that some persons’ memories may be at fault, and that there could, in theory, be abuse, but those factors are practical ones, not ones that affect the formal ability to identify the class. It has repeatedly been said that the number of claimants cannot itself affect the ability to use the representative procedure.”

The court concluded thus that the judge ought to have held that the members of the represented class had the same interest under CPR Part 19.6(1) and that they were identifiable

On the last issue posed to the court namely that can the trial judge’s exercise of discretion be vitiated? The Appellate court answered in the affirmative noting that the trial court took several matters into account including the inability to identify the members of the class, and that the members of the class had not authorized the claim. Both matters in the view of the court were irrelevant to the trial judge’s discretion. The Appellate court therefore held that “in these circumstances, it is open to this court to exercise its discretion afresh.”

Accordingly the court concluded that having considered carefully all the factors raised by both sides it is of the view that this is a claim which, as a matter of discretion, should be allowed to proceed. The court therefore allowed the appeal and made an order granting Mr Lloyd permission to serve the proceedings on Google outside the jurisdiction of the court.

**DECISION DIRECTION**

**Expands Expression**

The decision expands the fundamental right to privacy as it found that on the case pleaded, every member of the represented class has had their data deliberately and unlawfully misused, for Google’s commercial purposes, without their consent and in violation of their established right to privacy. ­

**GLOBAL PERSPECTIVE**

**Related International and/or Regional Laws**

Charter of Fundamental Rights of the European Union 2012; Article 8 and 47

General Data Protection Regulation 2016; Recital 85 and Art. 82.1

Data Protection Directive

**National Standards, Laws or Jurisprudence**

Data Protection Act,1998; Section 13

Data Protection Directive 1995; Article 23.

Civil Procedure Rules (CPR)

United Kingdom, AAA v. Associated Newspapers Ltd [2012] EWHC 2103 (QB), [2013] EMLR 2

United Kingdom, Altimo Holdings and Investment Ltd v. Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804

United Kingdom, Armonienè v. Lithuania [2009] EMLR 7

United Kingdom, Campbell v. MGN Ltd [2004] 2 AC 457

United Kingdom, Combinatie Spijker v. Provincie Drenthe Case (C-568/08)

 United Kingdom, Emerald Supplies Ltd v. British Airways plc. [2011] Ch 345

United Kingdom, Emerald Supplies Ltd. v. British Airways Plc [2011] Ch 345

United Kingdom, Fish Legal v. Information Commissioner (Case C-279/12) [2014] QB 521

United Kingdom, Gulati v. MGN Limited [2015] EWHC 1482 (Ch)

United Kingdom, Halford v. United Kingdom (1997) 24 EHRR 523

United Kingdom, Halliday v. Creation Consumer Finance Limited [2013] EWCA Civ 333

United Kingdom, In re X (Court of Protection: Deprivation of Liberty) [2016] 1 WLR 227

United Kingdom, Jameel (Yousef) v. Dow Jones & Co Inc [2005] EWCA Civ 75, [2005] QB 946

United Kingdom, Leitner v. TUI Deutschland GmbH & Co KG (Case-168/00) [2002] All ER (EC) 561

United Kingdom, Millharbour Management Ltd v. Weston Homes Ltd [2011] 3 All ER 1027

United Kingdom, Murray v. Express Newspapers [2007] EWHC 1908 (Ch), [2007] EMLR 22

United Kingdom, One Step (Support) Ltd v. Morris-Garner [2018] UKSC 20, [2018] 2 WLR 1353

United Kingdom, R (Lumba) v. Secretary of State for the Home Department [2012] 1 AC 245

United Kingdom, Shaw v. Kovac [2017] EWCA Civ 1028, [2017] 1 WLR 4773

United Kingdom, Vidal-Hall v. Google Inc [2015] EWCA Civ 311

United Kingdom,VTB Capital Plc v. Nutritek International Corp [2012] EWCA Civ 808 [2012] 2 Lloyd's Rep 313

United Kingdom, Watson, Laidlaw & Co Ltd v. Pott, Cassels & Williamson 1914 SC (HL) 18; (1914) 31 RPC 104,

United Kingdom, Weller v. Associated Newspapers Ltd [2014] EMLR 24

United Kingdom, Wrotham Park Estate Co Ltd v. Parkside Homes Ltd [1974] 1 WLR 798,

United Kingdom, Your Response Limited v. Datateam Business Media Limited [2014] EWCA Civ 281

United Kingdom, Meters Ltd v. Metropolitan Gas Meters Ltd (1911) 28 RPC 157

United Kingdom, Stoke-on-Trent City Council v. W & J Wass Ltd [1988] 1 WLR 1406

United Kingdom, Prudential Assurance v Revenue and Customs Commissioners [2018] UKSC 39

United Kingdom, Murray v. Express Newspapers [2008] EWCA Civ 446

United Kingdom, The Duke of Bedford v. Ellis [1901] A.C. 1

United Kingdom, Markt & Co v. Knight Steamship Company [1910] 2 K.B. 1021

United Kingdom, John v. Rees (1970) Ch 345

United Kingdom, EMI Records Ltd. v. Riley [1981] 1 W.L.R. 923

United Kingdom, Independiente Ltd v. Music Trading On-Line (HK) Ltd. [2003] EWHC 470 (Ch)

**CASE SIGNIFICANCE**

The decision establishes binding or persuasive precedent within its jurisdiction.

**OFFICIAL CASE DOCUMENTS**

The Judgment

https://www.shlegal.com/news/court-of-appeal-hands-down-significant-judgment-in-lloyd-v-google-llc-2019-ewca-civ-1599

<https://www.lexology.com/library/detail.aspx?g=8964cf59-5c1f-47af-8cc0-cc9a547cbe0a>

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